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Date of Decision: 13th December 1995

CRIMINAL APPEAL NO. 675 OF 1989

FOR APPROVAL AND SIGNATURE

THE HONOURABLE MR. JUSTICE A.N. DIVECHA

and

HONOURABLE MR. JUSTICE H.R. SHELAT

1. Whether Reporters of Local Papers may
be allowed to see the judgment? Yes

2. To be referred to the Reporter or not?
No

3. Whether their Lordships wish to see
the fair copy of judgment? No

4. Whether this case involves a
substantial question of law as to the
interpretation of the Constitution of
India, 1950 or any order made
thereunder? No

5. Whether it is to be circulated to the
Civil Judge? No

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Shri M.J. Budhabhatti, Advocate, for the Appellant

Shri S.R. Divetia, Addl. Public Prosecutor, for the Respondent

CORAM: A.N. DIVECHA & H.R. SHELAT, JJ.

(Date: 13th December 1995)

ORAL JUDGMENT (per Divecha, J.)

The judgment and order of conviction and sentence passed
by the learned Sessions Judge of Sabarkantha at Himatnagar on
30th August 1989 in Sessions Case No. 60 of 1987 convicting the
present appellant of the offence punishable under sec. 18 of
the Narcotic Drugs and Psychotropic Substances Act, 1985 (the

NDPS Act for brief) and sec. 67A of the Bombay Prohibition Act, 1949 (the Prohibition Act for brief) and sentencing him to rigorous imprisonment for 10 years and fine of Rs. 1 lakh in default rigorous imprisonment for one year more for the offence under the NDPS Act without awarding any separate sentence for the offence punishable under the Prohibition Act is under challenge in this appeal at the instance of the original accused.

2. The facts giving rise to this appeal move in a narrow compass. One Additional Police Sub-Inspector of the Town Police Station at Himatnagar, named, Shri G.P. Prajapati (the complainant for convenience), was taking round at about 11 p.m. on 23rd July 1987. After midnight at about 1.30 a.m. he went to the S.T. Depot at Himatnagar. He was accompanied by certain police officials also. At that place the appellant was found. He had one bag in his hand. He was trying to hide it on seeing the complainant and other police officials. Thereupon the police party became suspicious of his behaviour. Two panch witnesses were summoned. The appellant's name and whereabouts were ascertained. Thereafter the bag in his hand was recovered. It was opened. A cloth bag was found therefrom. It was stitched on all the sides. The police party became further suspicious. The stitches on one side were removed. There was found some blackish substance. It appeared to be opium. Its weight was found to be 2 Kgs. Its worth was assessed to be Rs. 3600. Some 50 gms. of sample was taken out therefrom. It was placed in a rectangular tin. It was thereafter sealed in presence of the panch witnesses. The remaining quantity of opium was kept in the very cloth bag and that cloth bag was also sealed. Thereafter the complainant lodged his complaint of the incident charging the appellant with the offences punishable under sec. 67A of the Prohibition Act and under sec. 18 of the NDPS Act. The proceeding arising therefrom came to be registered as Sessions Case No. 60 of 1987 in the Sessions Court of Sabarkantha at Himatnagar. At the end of the trial, the appellant came to be convicted of the offence punishable under sec. 18 of the NDPS Act and under sec. 67A of the Prohibition Act and sentenced to rigorous imprisonment for 10 years and fine of Rs. 1 lakh in default rigorous imprisonment for one year more for the offence punishable under the NDPS Act without imposition of any further sentence for the offence punishable under the Prohibition Act. The aggrieved appellant has thereupon invoked the appellate jurisdiction of this court by means of this appeal for questioning the correctness of his conviction and sentence.

3. This appeal can be disposed of on a short ground based on sec. 102(3) of the Code of Criminal Procedure, 1973 (the Cr.P.C. for brief). It may be mentioned that sec. 51 of the NDPS Act makes the relevant provisions contained in the NDPS Act

applicable to the extent they are not inconsistent with the provisions of the NDPS Act. Section 52(3) of the NDPS Act requires forwarding of the arrested person and the seized article inter alia to the officer in charge of the nearest police station. Sub-section (4) thereof requires the authority or officer to whom any person or article is forwarded inter alia under sec. sub-section (3) to take such measures as may be necessary for the disposal according to law of such person or article. There is no provision in the NDPS Act inconsistent with sec. 102(3) of the Cr.P.C. It is needless to repeat or to reiterate that, by virtue of sec. 51 of the NDPS Act, the provisions of the Cr.P.C. to the extent they are not inconsistent with the provisions contained in the NDPS Act would be applicable including to all arrests and seizures made thereunder. Section 102(3) of the Cr.P.C. inter alia requires a police officer seizing any property forthwith to report the seizure to the magistrate having jurisdiction.

4. It appears that the complainant inter alia carried the seized article to the Town Police Station at Himatnagar. In view of the aforesaid provision contained in sec. 102(3) of the Cr.P.C. read with sec. 52(4) and sec. 51 of the NDPS Act, the police officer in charge of the town police station was supposed to report the matter to the learned Chief Judicial Magistrate at Himatnagar. It appears that the aforesaid statutory provision contained in sec. 102(3) of the Cr.P.C. has not at all been complied with in the present case.

5. Rival submissions were urged before us whether the aforesaid statutory provision contained in sec. 102(3) of the Cr.P.C. was directory or mandatory. We do not propose to address ourselves on this question. Even if it is assumed to be directory, according to well-settled principles of law, its substantial compliance would be necessary. Non-compliance therewith would certainly be fatal to the prosecution and such non-compliance would vitiate the trial itself.

6. In this view of the matter, we have thought it fit not to deal with other rival submissions urged before us at the time of hearing. Since the relevant provisions contained in sec. 102(3) of the Cr.P.C. have not been complied with in the present case, the impugned judgment and order of conviction and sentence cannot be sustained in law. It has to be quashed and set aside.

7. In the result, this appeal is accepted. The judgment and order of conviction passed by the learned Sessions Judge of Sabarkantha at Himatnagar on 30th August 1989 in Sessions Case No. 60 of 1987 convicting the appellant of the offence punishable under sec. 18 of the NDPS Act and under sec. 67A of

the Prohibition Act and sentencing him to rigorous imprisonment for 10 years and fine of Rs. 1 lakh in default rigorous imprisonment for one year more for the offence punishable under the NDPS Act without imposing any separate sentence for the offence punishable under the Prohibition Act is quashed and set aside. We are told that the appellant is in jail serving his sentence pursuant to the impugned judgment and order. He is ordered to be set at liberty if no longer required in any other case. The muddamal may be disposed of according to law.
